2004 Commercial Law Developments

Steven O. Weise
Heller Ehrman White & McAuliffe LLP
Los Angeles, California

Teresa Wilton Harmon
Sidley Austin Brown & Wood LLP
Chicago, Illinois

TABLE OF CONTENTS

I. PERSONAL PROPERTY SECURED TRANSACTIONS*

A. *Scope of Article 9 and Existence of a Secured Transaction*

1. *General*

- *Watkins v. GMAC Fin. Servs.*, 785 N.E.2d 40 (Ill. App. Ct., *app. denied,* 203 Ill. 2d 571 (2003) – A secured party had a perfected security interest in insurance proceeds. The secured party had priority under the first-in-time rule over an attorney's lien even though the insurance proceeds were paid only because the attorney had sued the insurer on behalf of underlying obligor.

- *In re Cohen,* 305 B.R. 886 (B.A.P. 9th Cir. 2004) – An agreement between neighbors involved the transfer of rights under a car accident settlement agreement in exchange for a loan. The transaction constituted an Article 9 secured transaction. The court concluded that the security interest was not perfected because the kindly individual who had lent money to his down-and-out neighbor had not filed a financing statement.

- *Hechinger Liq. Trust v. BankBoston Retail Fin. Inc. (In re Hechinger Inv. Co. of Del., Inc.)*, Civ. No. 00-973-SLR, C.A. No. PB 03-5949, 2004 U.S. Dist. LEXIS 5537 (D. Del. Mar. 28, 2004) – A noteholder failed to demonstrate that it was entitled to an equitable lien due to an alleged breach of an indenture's negative pledge.

- *Marandola v. Marandola Mech., Inc.*, C.A. No. PB 03-5949, 2004 R.I. Super. LEXIS 115 (R.I. Super. 2004) – A supplier was unable to demonstrate that an assignment was within the exceptions to UCC §§ 9-109(6) or 9-309(2) The transaction was, therefore, subject to Article 9. The buyer was an unsecured creditor because it did not file a financing statement.

---

* We would like to express our deep appreciation to the following for their important assistance in assembling these materials: John F. Hilson, John Murdock, Harry Sigman, and Lynn Soukup. We also miss our good friend Jeff Turner.

- *LFD Operating, Inc. v. Ames Dep't Stores, Inc.*, Nos. 02 Civ. 6271 (SHS), -01-42217 (REG), -01-8139A (AJG), 2004 WL 1948754 (S.D.N.Y. Sept. 1, 2004) – The court looked to actual relationship between lender and debtor, rather than to the terms of trust and agency in the written agreement, to find that the lender was unsecured creditor. The net proceeds from sale of lender's merchandise at debtor's store were commingled with debtor's funds and were the debtor's property.

- *Pioneer Commercial Funding Corp. v. American Fin. Mortgage Corp.*, 54 UCC Rep. Serv. 2d 616, 855 A.2d 818 (Pa. 2004) – Secured party's bailee letter that provided that secured party had ownership of mortgage notes did not make the secured party the "owner" if actual deal was that secured party had only a security interest in the notes. Looking to the circumstances of the transaction rather than the text of the lender's bailee letter, the court found that the lender had a security interest in the borrower's account funds. The bank holding the account was, therefore, allowed to set-off debt against borrower's account despite the presence of another secured party.

  Comment: Even if the claim were a "payment intangible," the secured party would have to file a financing statement where the assignment of the payment intangible secures an obligation and has not been sold to the secured party. UCC § 9-309(3).

- *First Int'l Bank v. Continental Cas. Co.*, 53 UCC Rep. Serv. 2d 673, 7 Mass. L. Rptr. 575 (Mass. Super. Ct. 2004) – A bonding company that issued a performance and payment bond on a construction project did not have to perfect a security interest in its subrogation right to collect amounts owed to the construction company when the bonding company paid persons owed money by the construction company.

2. *Consignments*

- *South Beverly Wilshire Jewelry & Loan v. Superior Court,* 121 Cal. App. 4th 74 (2d Dist. 2004) – A consignor did not perfect its security interest in consigned goods. The consignee granted a security in the consigned goods. The secured party's security interest was senior to the consignor's rights even though consignee had been convicted as a thief for granting a security interest in the goods.

3. *Real Property*

   - *In re Tops Appliance City, Inc.*, 372 F.3d 510 (3d Cir. 2004) – A debtor's sale of a lease transferred the rights to proceeds from the lease rather than an interest in "real property." Because what was transferred was a contract right, the interest in the proceeds was perfected by the filing of a financing statement and did not require a real estate filing. The "transfer" occurred at the time the secured party received the rights to the proceeds and was outside the preference period.

4. *Intellectual Property and Anti-Assignment Issues*

   - *In re Media Props., Inc.,* 311 B.R. 244 (Bankr. W.D. Wis. 2004) – A secured party's perfected security interest attached prepetition to all of the debtor's "general intangibles," including the debtor's FCC license to the extent permitted by law, which included the right to sell the license with FCC approval and to retain the proceeds of the sale.

   - *Superbrace, Inc. v. Tidwell*, 124 Cal. App. 4th 388 (4th Dist. 2004) – State, and not federal, law applies to a licensee's transfer of a patent license. Under state law, the rights are not personal and can be transferred. The court rejected federal cases that applied federal common law to the assignment of a patent license. *See, e.g. In re CFLC, Inc.*, 89 F.3d 673 (9th Cir. 1996).

     Comment: Under this analysis, federal common law would not preempt the application of UCC § 9-408 to a security interest in a licensee's rights under a patent license.

   - *Grosso v. Miramax Film Corp.,* 383 F.3d 965 (9th Cir. 2004) – Copyright Act does not preempt action for implied-in-fact contract for submitting idea to studio where the contract claim does not seek to enforce rights that are "equivalent" to those protected by the Copyright Act.

   - *In re Chris-Don, Inc.*, 308 B.R. 214 (Bankr. D.N.J. 2004) – The secured party was perfected and had priority in the proceeds of the sale of the liquor licenses because (i) revised Article 9 overrode the anti-alienation provisions of the state's alcoholic beverage control statute, which precluded a licensee from using its liquor license as collateral for a loan, (ii) the liquor license was intangible property and was,

therefore, covered by the collateral description, and (iii) the secured lender's financing statement was first-in-time to the state's judgments against the debtor.

- *Singer Asset Fin. Co., L.L.C. v. Continental Cas. Co.,* 886 So. 2d 1004 (Fla. Dist. Ct. App. 2004) – The court held that an anti-assignment provision in a settlement agreement was valid and that therefore a foreclosing secured party did not have a direct action against the obligor on the assigned settlement agreement. UCC § 9-408(d). The court overruled a lower court decision that had concluded that the settlement was an annuity exempt from Article 9.

5. *Leasing*

- *HSBC Bank USA v. United Air Lines, Inc.*, 317 B.R. 335 (N.D. Ill. 2004) – The court held that the question of whether or not a lease is a "true lease" for purposes of Bankruptcy Code § 365 is to be determined by state law. UCC § 1-201(32).

- *In re Pillowtex*, *Inc.,* 52 UCC Rep. Serv. 2d 18, 349 F.3d 711 (3d Cir. 2003) – An agreement labeled as a "lease" was a true lease where (i) the term of the lease was eight years and the goods had a useful life of at least 20 years, (ii) the lessee did not have an option to renew for a nominal consideration, (iii) the lessee was not bound to renew the lease, and (iv) the lessee did not have an option to buy the goods for a nominal amount. UCC § 1-201(37). However, the transaction created a "security interest" because the only economically sensible thing for the lessor and lessee to do at the end of the lease was for the lessee to retain the goods.

  Comment: The court correctly disregarded the intent of the parties.

- *Zutz v. Case Corp.*, 52 UCC Rep. Serv. 2d 56, No. Civ. 02-1776 (PAM/RLE), 2003 WL 22848943 (D. Minn. Nov. 21, 2003) – Transaction labeled as a "lease" was a "security interest" where the lessee always intended to exercise its purchase option. The purchase option was not nominal. UCC § 1-201(37).

  Comment: The court improperly considered the lessee's "intent" (as opposed to the financial reality of the deal) in making the court's analysis.

- *B&S Mktg. Enters., LLC v. Consumer Prot. Div.*, 52 UCC Rep. Serv. 2d 687, 835 A.2d 215 (Md. Ct. Spec. App. 2003), *cert. denied,* 380 Md. 231 (2004) – Consumers entered into "sale-leaseback" transactions with a buyer-lessor. The lessor always "bought" the goods for the same amount and the "lessee" could buy the goods back at the end of the payments. The "lessor" never valued the goods. The transactions created "security interests" and not leases. UCC § 2-102(37).

- *In re Fleming Cos., Inc.*, 53 UCC Rep. Serv. 2d 30, 2004, 308 B.R. 693 (Bankr. D. Del. 2004) – Transaction labeled as a "lease" created a "security interest" where the term of the lease was for the entire useful economic life of the "leased" goods. UCC § 1-201(37).

- *In re Arney*, 54 UCC Rep. Serv. 2d 1, No. 04-90223, 2004 WL 1207769 (Bankr. C.D. Ill. June 2, 2004) – A tractor lease was a true lease where the lessee could terminate the lease at any time and the residual value of $20,000 was not "nominal." UCC § 1-201(37).

6. *Sales*

- *Stillwater Nat'l Bank & Trust Co. v. CIT Group/Equip. Fin., Inc.*, 383 F.3d 1148 (10th Cir. 2004) – A transfer of equipment between two parties was a secured financing and not a sale. The factors favoring a sale included the presence of a "bill of sale." The factors favoring a secured financing included the presence of a granting clause (granting a security interest and stating "Title … shall remain in the Assignor and is not transferred to Assignee for any purpose") and the presence of a mandatory repurchase at the end of the transaction (thus eliminating any risk of loss for the transferor).

  Comment: The mandatory repurchase of itself should have been determinative.

- *Tetra Applied Techs., Inc. v. H.O.E., Inc.*, 53 UCC Rep. Serv. 2d 650, 03-1523 (La. App. 3 Cir. May 26, 2004) – A debtor sold its accounts to a secured party and granted the secured party a security interest in the accounts. The secured party perfected that security interest. An account debtor of the debtor had an offset clause in its contract with the debtor and withheld some funds. The court held that the secured party had priority to any available funds over trade creditors of the

debtor because the debtor retained no interest in the sold accounts. UCC § 9-318.

- *In re NTA, LLC,* 54 UCC Rep. Serv. 2d 790, 380 F.3d 523 (1st Cir. 2004) – A debtor did not create a "security interest" in favor of a lender where the debtor gave up control of its assets but the terms of the agreement did not indicate an intention to create a security interest. UCC § 9-203. Thus the disposition of the proceeds of the assets could be enforced pursuant to the agreement and without compliance with Article 9. UCC § 9-623.

B. Security Agreement and Attachment of Security Interest

- *American Bank & Trust v. Shaull*, 678 N.W.2d 779 (S.D. 2004) – A debtor gave its secured party a security interest in all cattle on the debtor's property, despite fact that the debtor did not own all of the cattle. The true owner of the cattle and a prior lender were estopped from challenging the debtor's grant of security interest and the secured party had a security interest in the collateral owned by the others.

- *In re Outboard Marine Corp.*, 304 B.R. 844 (Bankr. N.D. Ill. 2004) – Although together the invoices sent by a seller and a financing statement strongly demonstrated the creditor's intent to obtain a security interest, they did not provide sufficient evidence of the debtor's intent to create a security interest. The financing statement was signed by the debtor, but did not reference the invoices and the invoices were not signed by the debtor.

- *In re Northern Merch., Inc.*, 371 F.3d 1056 (9th Cir. 2004) – A corporation could grant security interest to secure a loan to its shareholders.

- *Barlow Lane Holdings Ltd. v. Applied Carbon Tech. (Am.), Inc.,* No. 02-CV-028S (F), 2004 WL 1792456 (W.D.N.Y. Aug. 11, 2004) – A borrower and its affiliate signed a loan agreement with a lender. The affiliate also signed a security agreement granting a security interest in certain of its goods. The borrower used funds from the loan to buy the goods on behalf of the affiliate. The court held that borrower's actions in making the purchases on behalf of the affiliate also made the borrower subject to the affiliate's security agreement, even though the borrower was not party to the agreement.

- *Pride Hyundai, Inc. v. Chrysler Fin. Co., L.L.C.,* 369 F.3d 603 (1st Cir. 2004) - Relying on revised UCC § 9-204, the comments to UCC §§ 9-204, and 1-201(19), the court upheld the validity of a dragnet clause. The court held that it should not consider whether the future advances are "similar" In addition, the court applied the unambiguous wording of the future advance clause. The court also held that the secured party did not violate its duty of good faith in requiring a 1.5% deposit of the unpaid balance of all contracts before it would release its security interest.

- *Ponce de Leon v. Offner*, Nos. 02 C 3919, 03 C 3327, 2004 WL 1718661 (N.D. Ill. Aug. 2, 2004) – The court found that a material issue of fact was present as to whether a security agreement's language expressly stated that it applied to future advances such as that arising from debtor's consolidation of the three original loans into one.

- *In re Outboard Marine Corp.*, 52 UCC Rep. Serv. 2d 488, 300 B.R. 308 (Bankr. N.D. Ill. 2003) – A financing statement standing alone does not constitute a "security agreement." The financing statement may be read with the T's + C's sent by the creditor to the buyer. Where the T's + C's indicated the creditor's intent to obtain a security interest, but did not indicate the debtor's intent to create a security interest, no security interest was created and no "security agreement" existed.

- *First Nat'l Bank of Izard County v. Garner*, 53 UCC Rep. Serv. 2d 660, ___ S.W. 3d ___, No. CA03-1156, 2004 WL 1059526 (Ark. Ct. App. May 12, 2004) – A debtor could not create a security interest in a tractor owned by her ex-husband. UCC § 9-203.

- *In re S.M. Acquisition Co.*, 53 UCC Rep. Serv. 2d 665, No. 03 CV 7072, 2004 WL 1151575 (N.D. Ill. Apr. 29, 2004) – A debtor did not have "rights" in molds in its possession where there was no evidence the maker of the molds had sold them to the debtor. UCC § 9-203. Nor was the owner of the molds estopped to deny that the debtor had rights in the molds because the secured party could not show that it actually relied on the debtor's apparent ownership of the molds.

- *In re Howard,* 54 UCC Rep. Serv. 2d 612, 312 B.R. 840 (Bankr. W.D. Ky. 2004) – Court enforced a term in a 1998 security agreement that pro-

vided that the collateral would also secure "any other debt that [debtor] . . . may owe you [secured party]." UCC § 9-204.

C. Description of Collateral and the Secured Debt — Security Agreements and Financing Statements

- *Chattanooga Agric. Ass'n v. Sapp*, No. E-2003-01984-COA-R3-CV, 2004 Tenn. App. LEXIS 400 (Tenn. Ct. App. June 25, 2004) – A secured party's security interest was perfected despite the fact that an exhibit describing the collateral was never recorded. The secured party had a stamped, acknowledged copy of the full filing and the competing lienholder had contacted the lender indicating that it had searched and found a record of the lien. Former UCC § 9-403.

- *Baldwin v. Castro County Feeders I, Ltd.*, 53 UCC Rep. Serv. 2d 1, 678 N.W. 2d 796 (S.D. 2004) – A description of collateral as "livestock" was a sufficient description of collateral by "category." UCC § 9-108.

- *In re Lynch*, 54 UCC Rep. Serv. 2d 849, 313 B.R. 798 (Bankr. W.D. Wis. 2004) – A financing statement that described the collateral solely by reference to the security agreement did not sufficiently "indicate" the collateral for the financing statement to be effective. UCC § 9-502.

D. Perfection

1. Possession, Control and Other Perfection Methods

- *McFarland v. Brier*, 54 UCC Rep. Serv. 74, 850 A.2d 965 (R.I. 2004) – The court held that a security interest in a certificate of deposit was perfected by possession of the CD. The secured party's perfected interest had priority over a second creditor who had served writ of attachment.

  Comment: The case is interesting in light of past confusion under Article 9 over how to properly categorize a CD – as an instrument or security able to be perfected by possession, as a deposit account able to be perfected by control, or none of the above.

- *In re Gaylord Grain L.L.C.*, 306 B.R. 624 (B.A.P. 8th Cir. 2004) – A secured party failed to perfect security interest in two motor vehicles when it filed UCC financing statements with the Secretary of State

rather than applications for a certificate of ownership, which is the exclusive method of perfecting a lien in motor vehicles.

- *In re Renaud*, 308 B.R. 347 (B.A.P. 8th Cir. 2004) – A secured party's security interest in a motor vehicle and permanently affixed mobile home was unperfected despite filing of UCC financing statement and a real estate mortgage. The secured party did not have its interest noted on the certificates of title, which was the only way to perfect the security interest.

- *In re Sierra*, No. 03-45515-DML-13, 2004 Bankr. LEXIS 314 (Bankr. N.D. Tex. Mar. 17, 2004) – A secured party with a lien recorded on vehicles' certificates of title did not have priority over a secured party who had filed UCC financing statement because Article 9 requires the latter to perfect a security interest in cars held as inventory by an automobile dealer. UCC § 9-311(_).

- *In re Schwinn Cycling & Fitness, Inc.*, 54 UCC Rep. Serv. 2d 645, 313 B.R. 473 (D. Colo. 2004) – A security interest may remain perfected for 20 days when delivered by a bailee that has not issued a negotiable document of title to the debtor for shipping. UCC § 9-312(f). The secured party never filed a financing statement to perfect its security interest. However, the debtor filed bankruptcy during the 20-day temporary perfection and the court held that the filing of the bankruptcy did not extend the temporary perfection. To the extent the collateral turned into identifiable cash proceeds while the security interest was perfected, the secured party had a perfected security interest in the proceeds. UCC § 9-315.

2. *Preparation of Financing Statement*

- *Receivables Purchasing Co., Inc. v. R & R Directional Drilling, L.L.C.*, 588 S.E. 2d 831 (Ga. App. 2003) – A secured party filed a financing statement against a debtor that was named "Network Solutions, Inc." Unfortunately for the secured party, the financing statement showed the debtor's name as "Net Work Solutions, Inc." The error made the financing statement insufficient and it was not effective to perfect the secured party's security interest. UCC § 9-506.

- *In re Kinderknecht*, 308 B.R. 71 (B.A.P. 10th Cir. 2004) – Revised Article 9 requires that debtor's name on financing statement be exactly right, or located by use of secretary of the state's "standard" search logic. Where debtor's name of "Terrance" was shown on financing statement as "Terry," the financing statement was insufficient and secured party was not perfected.

- *Pankratz Implement Co. v. Citizens Nat'l Bank*, 102 P.3d 1165 (Kan. Ct. App. 2004) – The debtor's name was "Rodger House." The secured party filed a financing statement that named the debtor as "Roger House." Because a search of the filing office's UCC records under the "standard" search logic used by the filing office would not turn up the financing statement, the financing statement was not "sufficient" and thus was not "effective" to perfect the security interest.

- *In re FV Steel & Wire Co.*, 310 B.R. 390 (Bankr. E.D. Wisc. 2004) – A secured party made a loan to a debtor named "Keystone Consolidated Industries, Inc." The secured party filed a financing statement that named the debtor as "Keystone Steel & Wire Co." the debtor's trade name. The court held that the name was "seriously misleading" under the test of former Article 9 and held that the secured party was not perfected. Former UCC § 9-402.

  Comment: The court noted that it was "undisputed" that the financing statement would be ineffective under revised Article 9.

- *In re Smith*, 52 UCC Rep. Serv. 2d 521, 302 B.R. 865 (Bankr. C.D. Ill. 2003) – Under revised Article 9, the holder of an "agricultural lien" must file a financing statement to perfect that lien. UCC § 9-317. This rule did not apply retroactively to an agricultural lien obtained prior to the effective date of revised Article 9. UCC § 9-702.

3. *Filing of Financing Statement — Manner and Location, Lapse, Changes*

- *In re IT Group, Inc., Co.*, 307 B.R. 762 (D. Del. 2004) – Applying former Article 9, the court held that the lender's reliance on an opinion letter from debtor's counsel opining that the debtor was located in New Jersey was not dispositive and that the question of the debtor's location was to be decided on public, objective information available to all creditors.

- *In re Crowell*, 304 B.R. 255 (W.D.N.C. 2004) – A debtor filed for bankruptcy and moved to new state. The court held that secured parties remained perfected despite the fact that they had not filed financing statements in the debtor's new state within four months of the move because the debtor's bankruptcy tolled the four-month window. UCC § 9-316(a)(2).

- *United States v. Orrego*, No. 04-CV-0008 (SJ), 2004 U.S. Dist. LEXIS 12252 (E.D.N.Y. June 22, 2004) – In a new take on the "authority to file" rules for financing statements, court concluded that a federal prisoner was not entitled to file UCC financing statements against a judge, prosecutor and prison warden claiming liens in their real and personal property, solely because the officials used his name in official filings. In the absence of collateral being acquired, an agricultural lien or an authenticated security agreement, the court found the prisoner lacked the authority to file the financing statements.

E. Priority

1. *Priority — Set-Off, Claims of Unsecured Third Parties, Buyers, and Rights of Holders of Non-UCC Liens*

- *Tetra Applied Techs., Inc. v. H.O.E., Inc.*, 03-1523 (La. App. 3 Cir. 5/26/04) – A secured party with a security interest in accounts was entitled to enforce the account against an unsatisfied customer whose contract with debtor authorized it to withhold payments to the debtor only under certain circumstances.

- *Dalton Diversified, Inc. v. AmSouth Bank*, 605 S.E.2d 892 (Ga. Ct. App. 2004) – The court permitted a secured party to exercise rights under contracts between the debtor and third parties in which the secured party had a security interest. The court rejected claims that the secured party had tortiously interfered with the contracts because the secured party had a "legitimate economic interest" in them and thus acted with privilege. The court also concluded that the secured party was not liable for conversion or trespass for its actions relating to the debtor's invoices, because the documents granted title and possession of the invoices to the secured party.

- *In re Havens Steel Co., N.A.*, 317 B.R. 75 (Bankr. W.D. Mo. 2004) – A buyer of goods claimed to be a buyer in ordinary course of business that would take the goods free of the seller's secured party. UCC § 9-320. The court considered when the "sale" occurred for purposes of the BIOCOB definition in former UCC § 1-201(9). The court concluded that the sale occurred when the goods were "identified" to the contract. Finally the court had to determine if the buyer had "possession of the goods or . . . a right to recover the goods from the seller." Some goods were being delivered to the buyer under a services contract, so that UCC Article 2 did not apply to the transaction. The court held that under the common law, the buyer had a right to recover the goods and thus could be a BIOCOB even though Article 2 did not apply to that contract.

- *Associates Hous. Fin. L.L.C. v. Stredwick*, 83 P.3d 1032 (Wash. Ct. App. 2004) – An owner of property made a fraudulent transfer of the property. A lender of the transferee obtained a deed of trust on the property. An unsecured creditor of the transferor then attempted to void the transaction as a fraudulent transfer. The holder of the deed of trust had priority over the buyer from the unsecured creditor.

- *People v. Green*, 125 Cal. App. 4th 360 (4th Dist. 2004) – Under California Penal Code § 186.11 when a person has committed certain crimes, the state may seize that person's property and sell it to pay restitution to the victims of the crimes. The rights of the victims (treated as unsecured creditors) are subject to persons with a "security interest" in the assets. The criminal's attorney had a security interest in certain of the assets of the debtor. The security interest was not perfected. The court erroneously held that the rights of a holder of an unperfected security interest are senior to those of unsecured creditors. See UCC § 9-317(a)(2). The court notes that if the particular assets had been stolen the criminal would not have had "rights in the collateral" to which a security interest could attach.

- *Clapp v. Orix Credit Alliance, Inc.*, 52 UCC Rep. Serv. 2d 1016, 84 P.3d 833 (Or. Ct. App. 2004) – A debtor could assign its rights under a contract that were collateral even though the security agreement prohibited the debtor from transferring the collateral. UCC § 9-401.

- *Intermet Corp. v. Financial Fed. Credit, Inc.*, 52 UCC Rep. Serv. 2d 236, 588 S.E.2d 810 (Ga. Ct. App. 2003) – Lender obtained security interest in equipment that leasing company bought from an affiliate of the leasing company. A buyer of the equipment bought it from the distributor. The buyer was not a BIOCOB because the security interest it sought to take free of was not created by its seller (the distributor) but rather by someone else (the leasing company). UCC § 9-320(a).

- *In re Communication Dynamics, Inc.*, 52 UCC Rep. Serv. 2d 261, 300 B.R. 220 (Bankr. D. Del. 2003) – An account debtor that received notice of a security interest in its obligations to a debtor from a credit report on the debtor received an "authenticated record" that cut off its right to future set offs. UCC § 9-404.

- *In re Barker*, 53 UCC Rep. Serv. 2d 683, 306 B.R. 339 (Bankr. E.D. Cal. 2004) – A buyer that acquired a consumer debt took it subject to the debtor's claim that it had overpaid the deficiency. Thus the buyer was liable to the extent of amounts paid by the debtor. UCC § 9-404(d). The fact that the buyer had a contractual right with its seller to "put" the debt back to the seller did not mean that the purchase had not taken place to begin with.

- *First Capital Corp. v. Norfolk So. R.R. Co.*, 53 UCC Rep. Serv. 2d 36, No. 3:03-CV-214-M, 2004 WL 718975 (N.D. Tex. Mar. 31, 2004) – An account debtor may pay the assignor until the account debtor has "received" notification of the assignment of the obligation and that payment is to be made to the assignee. UCC § 9-406(a). A notice actually received by one person is not received by a second person unless the first person has reason to know of the need to pass the information along to the second person. Revised UCC § 1-202.

- *Brasher's Cascade Auto. Auction v. Valley Auto. Sales & Leasing*, 53 UCC Rep. Serv. 2d 990, 119 Cal. App. 4th 1038 (5th Dist. 2004) - A used-car wholesaler bought cars from an auctioneer and granted the auctioneer a security interest in the cars to secure their purchase price. The wholesaler then resold the cars to a dealer. The dealer may not have qualified as a BIOCOB where it did not observe reasonable commercial standards of fair dealing. Former UCC § 9-307. In this case the

failure was allegedly based on a failure to obtain certificates of title on the cars shortly after the transaction.

- *In re Hurst*, 53 UCC Rep. Serv. 2d 342, 308 B.R. 298 (Bankr. S.D. Ohio 2004) – A secured party that did not continue a financing statement filed to perfect its security interest in vehicles held as inventory was unperfected. UCC § 9-311.

- *In re North*, 53 UCC Rep. Serv. 2d 635, 310 B.R. 152 (Bankr. D. Ariz. 2004) – The perfection of a security interest in a vehicle covered by a certificate of title is governed by the law of the state that has issued the certificate. UCC § 9-303.

- *Conseco Fin. Servicing Corp. v. Lee*, 54 UCC Rep. Serv. 2d 96, No. 14-03-01194-CV, 2004 WL 1243417 (Tex. App. 2004) – A seller sold goods to a buyer and obtained a security interest in the goods. The seller then assigned the security interest to another lender, who perfected the security interest. The original buyer defaulted and the original seller retook possession of the goods. The original seller then sold the goods to the second buyer. The second buyer was not a BIOCOB that took the goods free of the security interest created by the first purchaser. A BIOCOB takes free of a security interest only if the security interest was created by its seller, which was not the case here. UCC § 9-320.

- *First Nat'l Bank of El Camp v. Buss*, 54 UCC Rep. Serv. 2d 706, 143 S.W. 3d 915 (Tex. App. 2004), *petition for review filed* (Nov. 1, 2004) – Buyers of cars could qualify as BIOCOBs that took cars free of security interest created by dealer, even though the dealer's secured party retained the title certificates.

2. *Priority — Competing Security Interests*

- *St. Paul Mercury Ins. Co. v. Merchants & Marine Bank*, 54 UCC Rep. Serv. 2d, 882 So. 2d 766 (Miss. 2004) – The court affirmed the UCC's "first to file or perfect" principle, holding that a perfected secured party had priority over a previous unperfected secured party even though the perfected secured party knew about the prior, unperfected security interest. *See* UCC § 9-322, Comment 4, Ex. 1.

- *First Dakota Nat'l Bank v. Performance Eng'g & Mfg., Inc.*, 53 UCC Rep. Serv. 2d 677, 676 N.W. 2d 395 (S.D. 2004) – A creditor's claim could not be subordinated if the creditor was not a party to the subordination agreement. UCC § 9-339.

4. *Proceeds*

- *In re Skagit Pacific Corp.*, 316 B.R. 330 (B.A.P. 9th Cir. 2004) – Under Bankruptcy Code § 552, a secured party's security interest in pre-petition inventory did not extend to post-petition accounts arising from the sale of that inventory to the extent the accounts were attributable "solely" to post-petition labor. The court applied Article 9 lowest intermediate balance tracing rules to analyze whether bank accounts hold "proceeds" of pre-petition accounts. UCC § 9-315, Comment 3.

- *U.S. Bank Trust Nat'l Ass'n v. Venice MD LLC*, 92 Fed. Appx. 948 (4th Cir. 2004) – Business revenues generated when a landlord took possession of a hotel and restaurant and operated them for several months could not be claimed by the secured party as collateral or the proceeds of its collateral because the security agreement did not grant a lien on business revenues and the revenues were not identifiable proceeds of a permanent disposition of the collateral.

- *Western Farm Serv., Inc. v. Olsen*, 53 UCC Rep. Serv. 2d 614, 90 P.3d 1053 (Wash. 2004) – A secured party had a security interest in potatoes. The debtor sold the potatoes and received an additional fee from the buyer for hauling them. That fee was "proceeds" of the potatoes in which the secured party had a security interest. Former UCC § 9-306.

F. *Default and Foreclosure*

1. *Default and Repossession of Collateral*

- *Motors Acceptance Corp. v. Rozier,* 597 S.E.2d 367 (Ga. 2004) – Repossessed collateral remains property of the debtor until the secured party goes through additional steps to obtain ownership, such as either selling the collateral or agreeing to retain it in satisfaction of the debt.

- *In re Menasche*, 52 UCC Rep. Serv. 2d 286, 301 B.R. 757 (Bankr. S.D. Fla. 2003) – A debtor in default may redeem the collateral only by paying the full amount owed. Article 9 does not provide any cure rights. UCC § 9-623.

- *Callaway v. Whittenton*, 52 UCC Rep. Serv. 2d 525, No. 1020660, 2003 WL 22977433 (Ala. Dec. 19, 2003) – Secured party "breached the peace" during a repossession of a car by using physical force to prevent the debtor from blocking the repossession. The use of physical force created a risk of injury to the debtor or third parties. UCC § 9-609.

- *In re Estis*, 54 UCC Rep. Serv. 2d 198, 311 B.R. 592 (Bankr. D. Kan. 2004) – A secured party that repossesses a car and obtains repossession title to the car does not become the owner of the car until the secured party forecloses on the car or retains it in satisfaction of the debt. Thus when the debtor filed bankruptcy prior to one of those events happening, the car was part of the debtor's bankruptcy estate and the automatic stay applied to the secured party's efforts to foreclose on the car. UCC § 9-619.

2. *Retention of the Collateral in Satisfaction of the Debt*

- *In re Clarkeies Mkt., L.L.C.,* No. 01-10700-JMD, 2004 WL 768651, (Bankr. D.N.H. Apr. 8, 2004) – A secured party took possession of and operated the collateral for three years before foreclosing. Applying former Article 9, the court held that the lender's actions amounted to strict foreclosure, despite the absence of a notice from the secured party to the debtor that the secured party intended to retain the collateral in satisfaction of the debt. The secured party was not entitled to a deficiency judgment.

3. *Notice and Commercial Reasonableness of Foreclosure Sale*

- *In re First Cent. Fin. Corp.*, 377 F.3d 209 (2d Cir. 2004) – Court would not impose a constructive trust in favor of a liquidator where there were adequate contractual remedies.

- *Auto. Fin. Corp. v. Smart Auto. Ctr., Inc.*, 334 F.3d 685 (7th Cir. 2003) – The circumstances of repossession and disposition of vehicles were

held to be commercially reasonable where collateral was sold at auction, the "normal" method of disposing of repossessed cars.

- *McDonald v. Rockland Trust Co.*, 52 UCC Rep. Serv. 2d 516, 798 N.E. 2d 323 (Mass. App. Ct. 2003) – A secured party that did not take possession of collateral did not incur any obligation to dispose of it in a commercially reasonable manner. Former UCC § 9-504.

- *DeRosa v. JP Morgan Chase*, 53 UCC Rep. Serv. 2d 132, 774 N.Y.S.2d 120 (N.Y. App. Div. 2004) (withdrawn from bound volume) – A secured party sent default and foreclosure notices to the debtor using the wrong zip code. However the secured party was able to show that the notices were signed by the doorman at the debtor's coop. In addition the publication of the notices had the wrong year for the sale. Nevertheless, the court held that the secured party had satisfied Article 9's notice requirements for the sale. Former UCC § 9-504.

4. *Effect of Failure to Give Notice or to Conduct Commercially Reasonable Foreclosure Sale*

- *Bonem v.Golf Club of Georgia, Inc.*, 52 UCC Rep. Serv. 2d 280, 591 S.E.2d 462 (Ga. Ct. App. 2003) – A member of a club signed a note to pay for his membership interest. He secured the note with his membership interest. When he defaulted on the note the club terminated his membership. The court held that the termination of the membership was not a "disposition" of property and the club could sue on the note. UCC § 9-610.

- *Singleton v. Stokes Motors, Inc.*, 53 UCC Rep. Serv. 2d 140, 595 S.E. 2d 461 (S.C. 2004) – A husband and wife co-owned the collateral and thus each was entitled to notice of the secured party's foreclosure sale. The secured party failed to give the proper notice. The court held that each of the husband and wife was a "debtor" and could seek penalties available to consumers in certain transactions. Former UCC § 9-507(1).

- *In re King*, 53 UCC Rep.Serv.2d 158, 305 B.R. 152 (Bankr. S.D.N.Y. 2004) – A secured party that sought payment from collateral provided by a guarantor was not seeking a "deficiency" from the primary obligor when the secured party sought to enforce its rights against the

guarantor. Thus Article 9 did not require the secured party to demonstrate that it had acted in a commercially reasonable manner with respect to the primary obligor's collateral. UCC § 9-610.

Comment: The law of guaranty may require the creditor to proceed first against the primary obligor, in the absence of a waiver from the guarantor. Restatement (Third) Suretyship and Guaranty § 15.

- *Coxall v. Clover Commercial Corp.*, 54 UCC Rep. Serv. 2d 5, 781 N.Y.S.2d 567 (N.Y. Civ. Ct. 2004) – The secured party failed to provide any evidence that it had acted in a commercially reasonable manner other than the sales price of the collateral. The foreclosure price was 18% of the original purchase price, which was set four months before the sale. The court held that the secured party had failed to carry its burden of proving that it had acted in a commercially reasonable manner. The court concluded that in this consumer transaction the absolute bar rule would apply in the absence of a statutory rule for consumer goods transactions. UCC 9-626(b).

G. Transition

- *Huntington Nat'l Bank v. Global Publ'g Papers, Inc.*, 54 UCC Rep. Serv. 2d 187, 853 A.2d 396 (Pa. Super. Ct. 2004) – The court applied the transition rules to determine which secured party had priority where the secured parties were located in states with different effective dates for revised Article 9. The court applied the *PEB Commentary* on this subject, 56 *Business Lawyer* 1725 (August 2001), and did not apply the choice-of-law rules of the second state.

II. REAL PROPERTY SECURED TRANSACTIONS

- *Dieckmeyer v. Redevelopment Agency of City of Huntington Beach*, 13 Cal. Rptr. 3d 624 (Cal. Ct. App. 2004) (review granted and cause transferred, 97 P.3d 813 (Cal. Sept. 15, 2004) – Where a deed of trust secures both a monetary obligation and affordable housing restrictions, the beneficiary does not have to reconvey the deed of trust upon satisfaction of the monetary obligation.

- *In re Kearns,* 314 B.R. 819 (B.A.P. 9th Cir. 2004) – UCC § 9-604's mixed-collateral rules clarify that a secured party that exercises Article 9 remedies against non-real property collateral and does not obtain a judgment on the debt itself does not trigger the one-action rules of California Code of Civil Procedure § 726.

- *Knapp v. Doherty,* 123 Cal. App. 4th 76 (6th Dist. 2004) – A notice of a foreclosure sale under a deed of trust that was served prematurely was still effective where the early service of the notice did not prejudice the borrower.

III. GUARANTIES

- *LP XXVI, LLC v. Goldstein*, 811 N.E.2d 286 (Ill. App. Ct. 2004) – A foreclosure on secured property did not apply to bar by *res judicata* a contract action on a guaranty of the secured debt.

- *Multimedia 2000, Inc. v. Attard*, 54 UCC Rep. Serv. 2d 149, 374 F.3d 377 (6th Cir. 2004) – Shareholders of a debtor granted a security interest in the stock of the debtor to secure a non-recourse guaranty. The guaranty provided that upon the debtor's default, the guarantors had to assign the stock to the secured party free of any claims. A breach of the obligation to assign the stock would convert the guaranty into a recourse obligation. When the debtor defaulted and the secured party demanded the assignments the guarantors provided the assignments, but also sent a letter claiming they were doing so under duress. The court held that it was possible that the claim of duress constituted a "claim" to the stock, thereby breaching the guarantor's obligations to transfer the stock free of claims. If the trial court reached that determination, then the guarantors could have personal liability.

IV. FRAUDULENT TRANSFERS

- *Bressner v. Ambroziak*, 379 F.3d 478 (7th Cir. 2004) – The court held that services do not fall within UFTA's definition of assets. Therefore, the debtor's working for his wife's corporation without pay was not a fraudulent transfer.

- *In re Valente*, 360 F.3d 256 (1st Cir. 2004) – A debtor transferred real estate property to his son less than one year before a creditor obtained a deficiency judgment against the debtor. The debtor lacked equity in the property at the time of the transfer and the statute of limitations had expired under the UFTA.

- *In re Sharp Int'l Corp.*, 302 B.R. 760 (E.D.N.Y. 2003) – Secured lender not liable for aiding and abetting fraudulent transfer claims. The UFTA did not preempt common law remedies applicable to fraudulent transactions and the debtor retained an equitable interest in the property which could be reached by the judgment.

- *In re Northern Merch., Inc.*, 371 F.3d 1056 (9th Cir. 2004) – Bank made a loan to a debtor's shareholders, but transferred the funds directly to the debtor and received a security interest in the debtor's property. The grant of the security interest was not a fraudulent transfer because the debtor had benefited from the loan. There was no bad faith, and there was no net change in the value of the estate or funds available to the debtors unsecured creditors.

- *Wisden v. Superior Court*, 124 Cal. App. 4th 750 (2d Dist. 2004) – A creditor asserting a fraudulent transfer claim is entitled to a jury trial.

- *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593 (9th Cir. 2004) – An issuance by a debtor of equity in itself was not a transfer of the debtor's property for purposes of the debtor asserting a fraudulent transfer claim.

V. FINANCIAL INSTITUTIONS

A. Regulatory and Tort Claims – Good Faith, Fiduciary Duties, Interference With Prospective Economic Advantage, Libel, Invasion of Privacy

- *Vogt v. Greenmarine Holding, LLC*, 318 F. Supp. 2d 136 (S.D.N.Y. 2004) – An employer simultaneously filed for bankruptcy and fired the majority of its workforce without giving prior notice as required by the WARN Act. The former employees sought damages from the eight investment companies that collectively owned or controlled a majority of the employer's stock. The court found that the plaintiffs had alleged facts, which, if true were sufficient to show that the investors acted functionally with the employer as a single business, particularly with regard to the decision to terminate a significant part of the employer's workforce and would, therefore, be employers of the plaintiffs within the meaning of the Act. The court suggests that lenders who are the "decision maker(s) responsible for the employment practice giving rise to the litigation" may be held liable under the Warn Act.

- *State Street Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158 (2d Cir.), *petition for cert. filed*, 73 U.S.L.W. 3354 (U.S. Nov. 30, 2004) (No. 04-753) – Creditor refused to consent to a sale of assets unless the borrower, who was in default, provided new collateral and new economic benefits to which creditor was not entitled under the terms of the credit agreements. The borrower argued that creditor violated its implied covenant of good faith and fair dealing by unreasonably and arbitrarily refusing to consent to the sale. The court concluded that, other than the general requirement that contracting parties act in good faith, there was no duty of reasonableness imposed on a lender unless expressly provided in the relevant agreement. The court ruled that the creditor is not prohibited from unreasonably and arbitrarily withholding such consent. Therefore, creditor could refuse to consent for any reason or no reason.

- *UMLIC VP LLC v. Matthias*, 364 F.3d 125 (3d Cir. 2004) – In a case involving property in the Virgin Islands, creditors who purchased loans from a federal government agency could foreclose on mortgages and were not subject to by statutes of limitations because the United States government is not bound by statue of limitations unless Congress expressly

makes one applicable. The purchasers stepped into the government's shoes.

- *Nortel Networks, Inc. v. Gold & Appel Transfer, S.A.*, 298 F. Supp. 2d 81 (D. D.C. 2004) – Relying on the Restatement (Second) of Contracts, the court concluded that the lender could be liable for failure to comply with borrower's oral borrowing notice in spite of the requirement in the loan agreement that a borrowing notice must be in writing. The court held that insisting upon a written borrowing notice would result in a disproportionate forfeiture to the borrower and that lender's past conduct in making advances based on oral notices constituted a waiver of the written notice requirement.

- *Delta Rault Energy 110 Veterans, L.L.C. v. GMAC Commercial Mortgage Corp.*, No. Civ. A. 04-139, 2004 U.S. Dist. LEXIS 15136 (E.D. La. Aug. 4, 2004) – The court upheld an "exit fee" provided for in a mortgage agreement, finding the exit fee to be either an additional fee or deferred interest added as consideration for making the loan.

- *Credit Suisse First Boston Mortgage Capital LLC v. Cohn*, No. 03 Civ. 6146 (DC), 2004 WL 1871525 (S.D.N.Y. Aug. 19, 2004) – Lender and borrower had arm's-length commercial transaction. Lender did not owe a fiduciary duty to borrower. Lender was allowed to release funds from a reserve maintenance fund.

- *Citibank v. Grupo Cupey, Inc.*, 382 F.3d 29 (1st Cir. 2004) – Lender's assignee could not pursue an action under a contract that expressly bound the assignees of all parties except the lender. The contract was silent as to assignees of the lender.

- *Wechsler v. Hunt Health Sys., Ltd.*, 330 F. Supp. 2d 383 (S.D.N.Y. 2004) – Lender's failure to collect third-party debt under factoring agreement, pursuant to which lender purchased borrower's receivables, was not a material breach of the agreement, but borrower's early termination and retention of account payments were.

B. Agent Banks

- *Coastal Bank ssb v. Chase Bank of Texas, N.A.*, 135 S.W.3d 840 (Tex. App. 2004) – Member of bank group sued lead bank for fraudulent inducement

after loan failed. A loan officer of the lead bank had described the borrower's credit as very satisfactory. The court held that the member bank had contractually agreed in two different documents not to rely on information provided by the lead bank, but to conduct its own investigation when deciding whether to participate in the syndicate.

- *Pressman v. Franklin Nat'l Bank*, 384 F.3d 182 (6th Cir. 2004) – Lender did not breach commitment when it refused to make a loan after lender failed to find a participant bank. The lender's obligation was contingent on finding a participant, despite statement by the lender's president prior to signing the commitment letter that a participant bank was ready to close.

- *Murray v. U.S. Bank Trust N.A.*, 365 F.3d 1284 (11th Cir. 2004) – Bondholders could not file a class-action claim against a prior trustee under an indenture for failure to file a continuation statement because the current trustee was authorized by the indenture to do so and had, in fact, sued the prior trustee on behalf of the bondholders.

- *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485 (S.D.N.Y. 2003) – Lenders cannot hold agent banks liable for the agent bank's failure to conduct adequate independent due diligence on the borrower's creditworthiness or intentions with respect to the use of borrowed funds.

C. Subordination

- *Heller Fin., Inc. v. Prudential Ins. Co. of Am.*, 371 F.3d 944 (7th Cir. 2004) – Credit agreement provided that net proceeds of a sale were applied first to the revolving loans. The security agreement provided that in the event of a bankruptcy, proceeds are distributed equally among the holders of the "Secured Obligations." Neither party provided evidence on how similar contracts are resolved. The court therefore "guessed" that the security agreement prevailed since upon an event of insolvency no further lending under the revolver would occur and the parties could have expressly subordinated the term loans to the revolving loans in the security agreement.

- *In re Hedged-Invs. Assocs., Inc.*, 380 F.3d 1292 (10th Cir. 2004) – Lender's loan to corporation who was operating a Ponzi scheme was not subordi-

nated because investors in corporation did not show inequitable conduct on part of lender under insider or outsider standard.

- *In re Onco Inv. Co.*, 316 B.R. 163 (Bankr. D. Del. 2004) – Holders of senior notes were the senior debt under a subordination agreement that provided that the subordinated debt was junior in right of payment to "Senior Indebtedness." That term was defined as "Obligations" owed by the common debtor. The debtor used its rights under the Bankruptcy Code to cure amounts owed to the "Senior Indebtedness" without payment of default interest and other amounts. Because those amounts were no longer "obligations" of the debtor, the subordinated debt was not subject to the senior debt's receipt of those amounts.

- *In re Bank of New England Corp.*, 364 F.3d 355 (1st Cir.), *cert. denied,* 125 S. Ct. 318 (2004) – Court rejects the "Rule of Explicitness" in determining whether to award post-petition interest pursuant to a subordination agreement.

- *Thermoview Ind., Inc. v. Clemmens*, 54 UCC Rep. Serv. 2d 1107, No. 2003-CA-001043-MR, 2004 WL 2260289 (Ky. Ct. App. Oct. 8, 2004) – A debtor could enforce a subordinated creditor's agreement to postpone its subrogation rights until the senior creditor was paid in full. UCC § 9-339.

D. Obligations Under Corporate Laws

- *Production Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772 (Del. Ch. 2004) – Directors of an insolvent corporation do not owe a fiduciary duty to creditors of the corporation. The corporation itself holds any claims based on a breach of fiduciary duties that might exist. The court indicates that its *Credit Lyonnais* decision had been misread in this area.

- *In re Global Serv. Group, LLC*, 316 B.R. 451 (Bankr. S.D.N.Y. 2004) – Theory of "deepening insolvency" was not an independent tort and therefore a lender's extension of credit to an insolvent company will not give rise to liability unless the plaintiff can show that the lender "prolonged the company's life in breach of a separate duty, or committed an actionable tort that contributed to the continued operation of a corporation and its increased debt."

Comment: The case provides some comfort to lenders after the 2003 Delaware *Exide Technologies* case, which suggests that lenders could be liable under the tort of deepening insolvency under Delaware law.

E. Securities Laws

- *Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, No. 00 Civ. 8058 (NRB), 2004 WL 2072536 (S.D.N.Y. Sept. 14, 2004) – An investor in beneficial interests in a trust holding commercial mortgage loans could not recover for misrepresentation/omissions under the federal securities laws where the investor had access to information that would have set the record straight. The court determined that the investor could not recover for misrepresentation or omissions because it had sufficient "red flags" and had sufficient access to additional information including reports about the loan portfolio.

- *Commodity Futures Trading Comm'n v. Zelener,* 373 F.3d 861 (7th Cir. 2004) – Contracts for the speculative sale or purchase of foreign currency were not futures subject to regulation under the Commodities Exchange Act when such contracts were not fungible and the counterparty to the contracts did not guarantee to offset the contracts.

VI. UCC - SALES AND PERSONAL PROPERTY LEASING

A. *Scope*

1. *General*

- *The Texas Dev. Co. v. Exxon Mobil Corp.*, 52 UCC Rep. Serv. 2d 61, 119 S.W.3d 875 (Tex. App. 2003) – Article 2 did not apply to a contract for the sale of engineering services.

- *Mecanique C.N.C., Inc. v. Durr Envtl., Inc.*, 52 UCC Rep. Serv. 2d 832, 304 F. Supp. 2d 971 (S.D. Ohio 2004) – Article 2 applied to a transaction involving the sale of a "good" because the "predominant" purpose of the transaction was to obtain the good. The fact that the seller engaged in significant installation and fabricating services in connection with the sale did not change the result. UCC § 2-102.

- *DiIorio v. Structural Stone & Brick Co., Inc.*, 53 UCC Rep. Serv. 2d 249, 845 A. 2d 658 (N.J. Super. Ct. App. Div. 2004) – Article 2 did not apply to stone supplied as part of building of a house where the predominant purpose of the transaction was the provision of services. UCC § 2-102.

- *Propulsion Techs., Inc. v Attwood Corp.*, 53 UCC Rep. Serv. 2d 466, 369 F.2d 896 (5th Cir. 2004) – A seller that manufactured a product pursuant to the buyer's specifications still produced and sold "goods" in a transaction subject to Article 2. UCC § 2-102.

- *AutoChlor Sys. of Minnesota, Inc. v. JohnsonDiversey*, 54 UCC Rep. Serv. 2d 443, 328 F. Supp. 2d 980 (D. Minn. 2004) – Under the predominant purpose test, distributorship agreements for goods, that also included territorial agreements, were contracts for the sale of goods and Article 2 applied to them. UCC § 2-102.

- *Lohman v. Wagner*, 54 UCC Rep. Serv. 2d 1057, 862 A.2d 1042 (Md. Ct. Spec. App. 2004) – Article 2 applies to the sale of pigs as "goods" even though the seller was also providing services to the buyer. The contract did not include a quantity term and was not enforceable for that reason. UCC § 2-201.

2. *Software and Other Intangibles*

   - *Piper Jaffray & Co. v. SunGard Sys. Int'l, Inc.*, 54 UCC Rep. Serv. 2d 1088, No. 04-2922 (RHK/JSM), 2004 WL 2222322 (D. Minn. Sept. 30, 2004) – Article 2 applied to the sale of a software system and the limitation on consequential damages was enforceable even where the limited remedies failed of their essential purposes. The limitation of remedies and the limitation of damages were independent, and not interdependent, terms of the agreement. UCC §§ 2-102, 2-719.

B. *Contract Formation and Modification; Statute of Frauds; "Battle of the Forms;" Contract Interpretation; Title Issues*

1. *General*

   - *Central Illinois Light Co. v. Consolidation Coal Co.*, 52 UCC Rep. Serv. 2d 75, 349 F.3d 488 (7th Cir. 2003) – A potential seller prepared an internal invoice that it never sent. Before and after the preparation of the invoice the potential buyer and seller were negotiating and exchanging drafts of a potential agreement, which was never signed. The invoice did not satisfy the statute of frauds. UCC § 2-201.

   - *Interstate Narrow Fabrics, Inc. v. Century USA, Inc.*, 52 UCC Rep. Serv. 2d 381, 218 F.R.D. 455 (M.D.N.C. 2003) – A course of performance could not override the express definition of a term in a contract for the sale of goods. However, it could operate as a modification of the agreement. UCC § 2-208.

   - *BioTech Pharmacal, Inc. v. International Bus. Connections, LLC*, 53 UCC Rep. Serv. 2d 476, ___ S.W. 3d ___, No. CA 03-46, 2004 WL 1109561 (Ark. Ct. App. May 19, 2004) – Seller could "accept" buyer's purchase orders by seller's performance where purchase orders did not expressly require a formal acceptance. UCC §§ 2-206, 2-208.

   - *Unique Techs., Inc. v. MicroStamping Corp.*, 53 UCC Rep. Serv. 2d 529, No. Civ. A. 02-6649, 2004 WL 350731 (E.D. Pa. Feb. 25, 2004) – In the absence of a writing, a contract for the sale of goods generally is enforceable only to the extent performed. UCC § 2-201.

2. *Battle of the Forms*

- *Dallas Aerospace, Inc. v. CIS Air Corp.*, 52 UCC Rep. Serv. 2d 295, 352 F.3d 775 (2d Cir. 2003) – A seller and a buyer entered into a written contract for the sale of goods. The written contract expressly disclaimed any warranties concerning the goods. The buyer could not modify the contract by delivering a purchase order with contrary terms, even where the seller subsequently accepted payments from the buyer. UCC §§ 2-207 and 2-209.

- *Fleming Cos., Inc. v. Krist Oil Co.*, 54 UCC Rep. Serv. 2d 120, 324 F. Supp. 2d 933 (W.D. Wis. 2004) – Under UCC § 2-207, a contract includes both the UCC's "gap-filler" terms and other terms added as a result of course of dealing. However, a term is not added to a contract as a result of course of dealing unless the acts of the parties indicate an understanding that obligations have been created.

C. *Warranties and Products Liability*

1. *Warranties*

- *Giallo v. New Piper Aircraft, Inc.*, 52 UCC Rep. Serv. 2d 88, 855 So.2d 1273 (Fla. Dist. Ct. App. 2003) – Buyer of goods could not bring fraud claim based on statement concerning quality of goods sold where the seller later delivered an agreement that the goods were sold "as is."

- *Voelker v. Porsche Cars N. Am., Inc.*, 52 UCC Rep. Serv. 2d 450, 353 F.3d 516 (7th Cir. 2003) – A lessee was not a "buyer" and the Magnuson-Moss Warranty Act did not apply.

- *Allstate Ins. Co. v Daimler Chrysler*, 53 UCC Rep. Serv. 2d 226, No. 03 C 6107, 2004 WL 442679 (N.D. Ill. Mar. 9, 2004) – A claim for economic damages based on an implied warranty may be brought by a buyer only against its immediate seller. UCC § 2-314.

- *Neuhoff v. Marvin Lumber & Cedar Co.*, 53 UCC Rep. Serv. 2d 711, 370 F.3d 197 (1st Cir. 2004) – A manufacturer of defective windows provided replacement windows after the warranty on the original windows had expired. The transfer of the replacement windows was not a "sale" of those windows and did not carry any implied warranties. UCC §§ 2-102, 2-314.

- *Fortune View Condo. Ass'n v. Fortune Star Dev. Co.*, 53 UCC Rep. Serv. 2d 792, 90 P.3d 1062 (Wash. 2004) – Language in a sales brochure as to the characteristics of goods could form an express warranty as to the goods. UCC § 2-313.

- *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 54 UCC Rep. Serv. 2d 166, 146 S.W.3d 79 (Tex. 2004) – A seller of windows warranted the future performance of the windows and thus the statute of limitations would not begin running until the buyer should have discovered the defect. 25% (3,000) of the windows in the skyscraper failed and the court held that that gave notice to the buyer of the defects for purposes of causing the statute of limitations to start running.

- *Parsley v. Monaco Coach Corp.*, 54 UCC Rep. Serv. 2d 301, 327 F. Supp. 2d 797 (W.D. Mich. 2004) – A seller disclaimed implied warranties in language on the back of a purchase agreement. The disclaimers were "conspicuous" as required by Article 2 where the front of the agreement had conspicuous statements referring to exclusions on the back of the agreement. UCC § 2-314.

- *Morningstar v. Hallett*, 54 UCC Rep. Serv. 2d 716, 858 A.2d 125 (Pa. Super. Ct. 2004) – An "as is" statement in a sales agreement for the sale of a horse was effective to disclaim implied warranties. However it did not override an express statement that the horse was eleven years old. The buyer claimed that the horse was in fact sixteen years old and that the seller had breached an express warranty as to the horse's age. UCC § 2-316.

- *Hewlett-Packard Co. v. Intergraph Corp.*, 54 UCC Rep. Serv. 2d 783, No. C 03-2517 MJJ, 2004 WL 1918892 (N.D. Cal. Aug. 24, 2004) – Warranty disclaimers were conspicuous and not unconscionable where set forth in separate contract clauses, distinctly titled, and printed in all capital letters. UCC §§ 2-302, 2-316.

2. *Limitation of Liability*

- *General Elec. Co. v. Varig-S.A.*, 52 UCC Rep. Serv. 2d 936, No. 01 Civ. 11600RJHJCF, 2004 WL 253320 (S.D.N.Y. Feb. 10, 2004) – Limitation of remedies and limitation of consequential damages were enforce-

able and did not deprive buyer of the substantial value of the goods. In addition, they were not unconscionable where they were part of a heavily negotiated agreement. UCC § 2-719.

3. *"Economic Loss" Doctrine*

- *Equistar Chems., L.P. v. Dresser-Rand Co.*, 52 UCC Rep. Serv. 2d 128, 123 S.W.3d 584 (Tex. App. 2003) – Components of a product were not "other products" so that the economic loss rule prevented bringing a tort claim for damage to those components.

- *Kalmes Farms, Inc. v. J-Star Indus., Inc.*, 52 UCC Rep. Serv. 2d 845, No. Civ. 02-1141 (DWF/SRN), 2004 WL 114976 (D. Minn. Jan. 16, 2004) – The "economic loss rule," as implemented in a state statute that excluded "fraud" from the rule did not prevent a claim for negligent misrepresentation under the court's interpretation of the statute.

- *Tietsworth v. Harley-Davidson, Inc.*, 53 UCC Rep. Serv. 2d 721, 677 N.W. 2d 233 (Wis. 2004) – The economic loss rule barred a fraudulent concealment claim as to a "propensity" of the goods to have a particular problem where the allegations were speculative.

D. Performance, Breach and Damages

- *Sutter Ins. Co. v. Applied Sys., Inc.*, 52 UCC Rep. Serv. 2d 548, No. 02 C 5849, 2004 WL 161508 (N.D. Ill. Jan. 26, 2004) – A buyer's notice of breach does not have to be in writing. UCC § 2-607(3)(a).

- *Saffire Corp. v. Newkidco, LLC*, 52 UCC Rep. Serv. 2d 147, 286 F. Supp. 2d 302 (S.D.N.Y. 2003) – "Early termination" payments were enforceable, and not "penalties," where they took into account deferred payments.

- *In re Phar-Mor, Inc.*, 52 UCC Rep. Serv. 2d 154, 301 B.R. 482 (Bankr. N.D. Ohio 2003) - Seller's reclamation claims under UCC § 2-702 were full value of the goods even though those claims were subject to the security interests of secured parties of the buyer. The secured parties were paid from other sources so the reclamation claims were not affected.

- *Purina Mills, L.L.C. v. Less*, 52 UCC Rep. Serv. 2d 310, 295 F. Supp. 2d 1017 (N.D. Iowa 2003) – Seller of pigs was not excused from its contract with its supplier where the seller's buyer breached its contract with the seller

to buy the pigs. The supplier was entitled to its lost profits on the sale of the pigs. UCC § 2-708.

- *Florida Recycling Servs., Inc. v. Petersen Indus., Inc.*, 52 UCC Rep. Serv. 2d 359, 858 So. 2d 1114 (Fla. Dist. Ct. App. 2003) – When a buyer breached a contract to purchase goods, the seller resold it to another. The resale required some modifications to the goods. The cost of the modifications were "incidental" damages. UCC § 2-710.

- *Arthur v. Microsoft Corp.*, 53 UCC Rep. Serv. 2d 195, 676 N.W.2d 29 (Neb. 2004) – Any possible unconscionability in a license of software was not a basis for an affirmative claim for monetary damages. UCC § 2-302.

- *Tradax Energy, Inc. v. Cedar Petrochemicals, Inc.*, 53 UCC Rep. Serv. 2d 243, 317 F. Supp. 2d 373 (S.D.N.Y. 2004) – A buyer's request that the seller provide the buyer with a "trivial" form did not amount to a demand for performance outside the contract that would support a claim for anticipatory repudiation. UCC § 2-610.

- *Fryatt v. Lantana One, Ltd.*, 53 UCC Rep. Serv. 2d 543, 866 So.2d 158 (Fla. Dist. Ct. App. 2004) – The value of the time of a salaried employee to attempt to fix defective goods was not "incidental" damages. UCC § 2-715.

- *Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG*, 53 UCC Rep. Serv. 2d 878, No. 03 C1154, 2004 WL 1535839 (N.D. Ill. July 7, 2004) – A seller was excused from delivering goods on time when the port the seller was going to use (St. Petersburg, Russia) froze over at an earlier time (December) than it had frozen in the past (January). UCC § 2-615.

- *Paul T. Freund Corp. v. Commonwealth Packing Co.*, 54 UCC Rep. Serv. 2d 966, No. 00-CV-6572 CJS(F), 2004 WL 2075427 (W.D.N.Y. Sept. 15, 2004) – Purchaser could not claim commercial impracticability as a defense where the seller's supplier was late in timely delivery of raw materials for the product given that the purchaser had specified the particular raw materials.

E. Personal Property Leasing

- *Wells Fargo Bank Minnesota, N.A. v. Nassau Broad. Partners, L.P.*, 52 UCC Rep. Serv. 2d 249, No. 01 Civ. 11255 (HB), 2003 WL 22339299 (S.D.N.Y.

Oct. 10, 2003) – A "hell or high water" term was enforceable even if it was harsh. UCC § 2A-407.

- *Relational Funding Corp. v. TCIM Servs., Inc.*, 53 UCC Rep. Serv. 2d 70, No. Civ. 01-821-SLR, 2004 WL 392875 (D. Del. Feb. 24, 2004) – A "hell or high water" clause in a finance lease was not enforceable where assignee of lessor's rights under lease did not inform the lessee where to send the leased equipment upon termination of the lease, which was a condition to the lessee's duty to ship the equipment.

- *Preferred Capital, Inc. v. Warren*, 54 UCC Rep. Serv. 2d 237, 778 N.Y.S.2d 803 (N.Y. App. Div. 2004) – A lease that provided for acceleration of rent without mitigation of damages was unconscionable and could not be enforced to that extent.

VII. COMMERCIAL PAPER, ELECTRONIC FUNDS AND TRANSFERS

A. *Negotiable Instruments and Holder in Due Course*

- *O'Halloran v. First Union Nat'l Bank of Florida*, 350 F.3d 1197 (11th Cir. 2003) – Bank not liable for permitting embezzler to withdraw funds from bank accounts.

- *Packaging Materials & Supply Co., Inc. v. Prater*, 52 UCC Rep. Serv. 2d 465, 882 So.2d 861 (Ala. Civ. App. 2003) – A person that signs a check for an entity is not personally liable on the check where the check "identifies" the entity. UCC § 3-402.

- *Gerber & Gerber, P.C. v. Regions Bank*, 52 UCC Rep. Serv. 2d 815, 596 S.E.2d 174 (Ga. Ct. App. 2004) – An employee stole cashiers checks indorsed in blank and deposited the checks into the employee's own account. When considering the question of whether the bank acted in good faith, the court carefully observed that the requirement that the bank observe "reasonable commercial standards of fair dealing" did not address the level of care the bank observed. The bank may have failed to observe "reasonable commercial standards of fair dealing" when it allowed the deposits. UCC §§ 3-103 and 3-406.

- *U.S. Bank Nat'l Ass'n v. Whitney*, 52 UCC Rep. Serv. 2d 1, 81 P.2d 135 (Wash. Ct. App. 2003) – Tender of payment under UCC § 3-311 must be made at the place specified in the note to be effective.

- *Beal Bank v. Siems*, 52 UCC Rep. Serv. 2d 11, 670 N.W.2d 119 (Iowa 2003) – Holder in due course with "notice" of guarantor's discharge. UCC § 3-302.

  Comment: Court should not have applied Article 3 rules when the guarantor had signed a separate guaranty and was not a party to the instrument.

- *Agriliance, L.L.C. v. Farmpro Servs., Inc.*, 52 UCC Rep. Serv. 2d 36, 328 F. Supp. 2d 958 (S.D. Iowa 2003) – Subordinated creditor was not holder in

due course of checks where it should have known that checks were funded by senior creditor.

- *Aquaduct, L.L.C. v. McElhenie*, 52 UCC Rep. Serv. 2d 191, 116 S.W.3d 438 (Tex. App. 2003) – Payment by maker of note to servicing agent that collected note for the actual owner of the note was under agency law a payment to the actual owner as the "holder" of the note because it had possession of the note.

- *Wisner Elevator Co., Inc. v. Richland State Bank*, 52 UCC Rep. Serv. 2d 349, 37,764-CA (La. App. 2 Cir. Dec. 12, 2003) – Although payee of check typed on the back of the check that a portion of the proceeds of the check should be used to pay a creditor of the payee, the payee could deposit the check in its own account without paying the creditor. The typed instructions were not an "indorsement" to the creditor and the creditor did not have a conversion claim against the bank. UCC § 3-420.

- *Triffin v. Mellon PSFS*, 53 UCC Rep. Serv. 2d 971, 855 A.2d 2 (N.J. Super. Ct. App. Div. 2004) – Regulation CC displaces the UCC only to the extent the UCC is "inconsistent" with the regulation.

- *Nebraska Hosp. Ass'n Charitable, Scientific, and Educ. Found. v. C & J P'ship*, 53 UCC Rep. Serv. 2d 943, 682 N.W.2d 248 (Neb. 2004) – A payee of a cashier's check indorsed it to an escrow agent. The escrow agent embezzled the funds. The payee, and not the remitter of the check (the person who purchased the check) had the risk of this loss.

- *Mid Wisconsin Bank v. Forsgard Trading, Inc.*, 53 UCC Rep. Serv. 2d 898, 668 N.W.2d 830 (Wis. Ct. App. 2003) – A bank that gave immediate credit on a deposit acted in "good faith" because doing so did not run afoul of reasonable commercial standards of fair dealing. Thus the bank could be a holder in due course of the check. UCC § 3-305.

- *Crick v. HSBC Bank USA*, 53 UCC Rep. Serv. 2d 271, 775 N.Y.S.2d 497 (N.Y. Civ. Ct. 2004) – Payment of checks in accordance with a restrictive indorsement does not protect the depositary bank where the bank has knowledge of a breach of fiduciary duty. UCC § 3-206.

- *Triffin v. Ameripay, LLC*, 53 UCC Rep. Serv. 2d 573, 847 A.2d 628 (N.J. Super. Ct. App. Div. 2004) – Representative that signs a check for a princi-

pal is not liable on the check where the representative capacity is indicated on the check. UCC § 3-402. The printed name of the principal was sufficient to indicate the representative capacity of the person signing the check. The principal was liable on the check. UCC § 3-401.

- *In re Miller*, 53 UCC Rep. Serv. 2d 585, 310 B.R. 185 (Bankr. C.D. Cal. 2004) – A "bad" check (a "marker" in a casino), standing alone, is not sufficient to establish fraud for purposes of the discharge of the claim. Bankruptcy Code § 523(a)(2)(A).

- *Leavings v. Mills*, 54 UCC Rep. Serv. 2d 678, No. 01-03-00047-CV, 2004 WL 1902536 (Tex. App. Aug. 26, 2004) – A retail installment contract that was conditioned on the delivery of another document and was not payable to bearer was not a "negotiable" instrument and the holder could not be a holder in due course. UCC § 3-104.

- *Tamman v. Schinazi*, 54 UCC Rep. Serv. 2d 287, No. 00CV9404GBD, 2004 WL 1637000 (S.D.N.Y. July 21, 2004) – A couple gave some money to the husband's cousin. The cousin invested the money and lost it. The couple said the transfer was a loan and the cousin said he was a just an intermediary for the couple's investments. The couple argued that the cousin had signed a negotiable instrument and that would conclusively prove the existence of a "loan." The court held the note did not constitute a negotiable instrument.

  Comment: Even if the note had been a negotiable instrument, that should not "prove" the nature of the transactions between the parties to the note in the absence of the holder of the note being a holder in due course. UCC § 3-104.

- *Griffith v. Mellon Bank, N.A.*, 54 UCC Rep. Serv. 2d 373, 328 F. Supp. 2d 536 (E.D. Pa. 2004) – A person bought goods stored in a self-storage facility. A book included in the goods had a 29-year-old bearer CD in it. The buyer claimed to be a holder in due course of the CD. The court held that the buyer was not a holder in due course because it had not given value for the CD. UCC § 3-302. Although the buyer had paid for the book, the buyer did not know the CD was inside the book when it bought the book.

- *Olympic Title Ins. Co. v. Fifth Third Bank of W. Ohio*, 54 UCC Rep. Serv. 2d 569, No. 20145, 2004 WL 2009285 (Ohio Ct. App. Sept. 10, 2004) – UCC § 3-420 displaces common law negligence claim for conversion.

B. Payment-in-Full Checks

- *Morgan v. The Village Printers, Inc.*, 54 UCC Rep. Serv. 2d 599, No. C-030701, 2004 WL 1585553 (Ohio Ct. App. July 16, 2004) – A payment-in-full check did not create an accord and satisfaction where the payor did not have a *bona fide* dispute with the payee over the amount owed by the payor to the payee. The determination of the existence of a *bona fide* dispute was a question of fact for the finder of fact. UCC § 3-111.

- *Auto Glass Express, Inc. v. Hanover Ins. Co.*, 54 UCC Rep. Serv. 2d 1069, 2004 WL 2222844 (Conn. Super. Ct. Sept. 14, 2004) – A payee's negotiation of payment-in-full checks that bore a conspicuous legend to that effect and where a *bona fide* dispute existed was effective to create an accord and satisfaction. UCC § 3-311.

C. Electronic Funds Transfer

- *TME Enters., Inc. v. Norwest Corp.*, 124 Cal. App. 4th 1021 (2d Dist. 2004) – Under Regulation J (12 CFR §§ 210.25 – 210.32), which incorporates UCC Article 4A, a bank accepting a wire transfer with an account number and account holder name that do not match can credit the funds based on the account number unless the bank personnel handling the transaction have actual knowledge of the discrepancy.

D. Usury

- *Gibbo v. Berger*, 123 Cal. App. 4th 396 (4th Dist. 2004) – A real estate secured loan was not entitled to the exemption from usury laws for loans "arranged" by a real estate broker under California Civil Code § 1916.1. The real estate broker performed only ministerial services, such as filling in loan documents per the instructions of others and ordering a title report.

- *American Equities Group, Inc. v. Ahava Dairy Prods. Corp.*, No. 01 Civ. 5207 (RWJ), 2004 U.S. Dist. LEXIS 6970 (S.D.N.Y. Apr. 23, 2004) – Unlike civil

usury, New York law is not clear on what remedy is available to the victim of criminal usury.

- *D-Beam Ltd. P'ship v. Roller Derby Skates, Inc.*, 366 F. 3d 972 (9th Cir. 2004) – A note was not usurious where payments were wholly contingent on the obligor's receipt of royalties under a patent license.

VIII. LETTERS OF CREDIT, INVESTMENT SECURITIES, AND DOCUMENTS OF TITLE

A. *Letters of Credit*

- *DBJJJ, Inc. v. National City Bank*, 123 Cal. App. 4th 530 (2d Dist. 2004) – Under UCP 500, Article 14(d)(i) an issuer of a letter of credit has a "reasonable time, not to exceed seven banking days" to raise discrepancies to the documents presented or will be precluded from raising non-conformance as a defense. The reference to "seven banking days" does not automatically make that period of time "reasonable," depending on the circumstances.

- *Daiwa Prods., Inc. v. Nationsbank, N.A.*, 885 So.2d 884, 54 UCC Rep. Serv. 2d 807 (Fla. Dist. Ct. App. 2004) – An issuing bank was able to obtain reimbursement from the applicant under a letter of credit where the beneficiary submitted fraudulent documents. The issuing bank was unaware of the fraud, and acted in good faith and in a commercially reasonable manner.

- *In re Kmart Corp.*, 297 B.R. 525, 52 UCC Rep. Serv. 2d 222, 2003 WL 22048176 (N.D. Ill. 2003) – Rights of account party under letter of credit are not part of account party's estate in bankruptcy because the beneficiary holds a direct obligation of the issuer and receives payment of the issuer's funds.

- *JPMorgan Chase Bank v. Cook*, 318 F. Supp. 2d 159, 52 UCC Rep. Serv. 2d 999 (S.D.N.Y. 2004) – The issuer of a letter of credit was entitled to subrogation to the beneficiary's claim against the applicant. UCC § 5-117.

- *In re Mayan Networks Corp.,* 306 B.R. 295, 53 UCC Rep. Serv. 2d 105 (B.A.P. 9th Cir. 2004) – As a result of UCC § 5-117 and the subrogation rights that an issuer of a letter of credit may have, a letter of credit is no longer necessarily "independent." Where the applicant gave collateral to the issuer of the letter of credit, a landlord's draw under the letter of credit counted as a payment for purposes of the "cap" of Bankruptcy Code § 502(b)(6).

- *Shaanxi Jinshan TCI Elecs. Corp. v. FleetBoston Fin. Corp.*, 807 N.E.2d 180, 53 UCC Rep. Serv. 2d 306 (Mass. App. Ct. 2004) – A beneficiary under a letter of credit made a draw. The issuing bank noted discrepancies. Prior to the beneficiary making a second draw (before the expiration of the letter of credit), the applicant obtained an injunction against the beneficiary making a draw. However the beneficiary was never served in the matter nor was the injunction delivered to it. Thus the beneficiary was entitled to make the draw.

- *Daiwa Prods., Inc. v. Nationsbank, N.A.*, 885 So.2d 884, 54 UCC Rep. Serv. 2d 807 (Fla. Dist. Ct. App. 2004) – Beneficiary under letter of credit presented fraudulent documents to make a draw. The beneficiary's creditor was a holder in due course of a draft drawn on the issuing bank and the issuing bank had to honor the draft under the independence principle. UCC § 5-114.

- *Carter Petroleum Prods., Inc. v. Brotherhood Bank & Trust Co.*, 97 P.3d 505, 54 UCC Rep. Serv. 2d 924 (Kan. Ct. App. 2004) – A letter of credit provided that it was payable at "sight." The beneficiary arrived at the bank on the day of expiration of the letter of credit after the bank lobby was closed. The drive through window was still open. The court held that the beneficiary had made a timely presentation. UCC § 5-108.

- *Citizens for Goleta Valley v. HT Santa Barbara*, 117 Cal. App. 4th 1073 (2d Dist. 2004) – As part of a settlement, a party that was obliged to pay money had to post a letter of credit or a payment bond to back its payment obligation. The obligor posted a bond, but the bonding company later became insolvent. The court held that the obligor had to post a substitute bond or letter of credit.

B. Investment Securities

- *Mortgage Invs. Corp. v. Battle Mountain Corp.*, 93 P.3d 557, 52 UCC Rep. Serv. 2d 231 (Colo. Ct. App. 2003) – Buyer of stock could obtain equitable ownership of stock without compliance with Article 8 provisions concerning delivery of a certificate. Those rules affect cutting off the claims of third parties and the like, but are not exclusive.

- *Consolidated Edison, Inc. v. Northeast Utils.*, 318 F. Supp. 2d 181, 53 UCC Rep. Serv. 2d 446 (S.D.N.Y. 2004) – The transfer of a security includes all

of the transferor's "rights" in the security. UCC § 8-302. Those "rights" do not include a claim the transferor may have in its capacity as a shareholder and third-party beneficiary of a contract between the issuer and a third party.

- *Tradewinds Fin. Corp. v. Refco Sec., Inc.*, 773 N.Y.S.2d 395, 53 UCC Rep. Serv. 2d 123 (N.Y. App. Div. 2004) – Although Article 8 does not have a statute of frauds that applies to the "sale" of a security, Article 8 does not displace any statute of frauds that would otherwise apply to the financing of the purchase of a security. UCC § 8-113.

- *Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank N.A.*, 374 F.2d 521, 53 UCC Rep. Serv. 2d 695 (7th Cir. 2004) – A securities broker that was not "bank" had common laws duties akin to those owed by a bank when the broker performed checking services and processed an unauthorized check. UCC § 4-406.

- *R.A. Mackie & Co. v. Petrocorp Inc.*, 329 F. Supp. 2d 477, 54 UCC Rep. Serv. 2d 483 (S.D.N.Y. 2004) – A corporation issued warrants. The corporation allegedly breached its obligations under the warrants. The holders of the warrants transferred them. The purchasers of the warrants acquired the seller's right to sue for breach of the warrants as part of the transfer of all of the seller's rights "in"the warrants. UCC § 8-302.

- *S.E.C. v. Credit Bancorp, Ltd.*, 386 F.3d 438, 55 UCC Rep. Serv. 2d 74 (2d Cir. 2004) – A secured party that took a security interest in securities did not have a security interest free of adverse claims to the securities where the lender ignored "circumstances strongly suggesting the likelihood that such claim exists." UCC §§ 8-102(a)(1), 8-510.

- *Hughes Developers, Inc. v. Montgomery*, 54 UCC Rep. Serv. 2d 1031, No. 1030841, 2004 WL 2201941 (Ala. Oct. 1, 2004) – Stock in a closely-held corporation is a "security" under Article 8. UCC § 8-103. A secured party is a "purchaser" and upon giving value took the stock free of defects in its issuance. UCC §§ 1-201(32), (33), 8-202.

C. Documents of Title

- *Menorah Ins. Co., Ltd. v. W.F. Whelan Co., Inc.*, 110 Fed. Appx. 524, 54 UCC Rep. Serv. 2d 1052 (6th Cir. 2004) – The court concluded that a bailor ac-

cepted the bailee's limitations on its liability even though the bailor never signed an agreement to that effect. The limitation appeared in the bailee's invoices, which the bailor had paid. The court held that the payment of the invoices amounted to an agreement to be bound by the limitation. UCC § 7-204.

IX. CONTRACTS

A. *Formation, Scope, and Meaning of Agreement*

- *Rosenfeld v. Zerneck*, 776 N.Y.S.2d 458 (N.Y. Sup. Ct. 2004) – An e-mail was an "authenticated record" and could create a binding contract. The court distinguished an earlier case involving a fax where a party's name was automatically added to the fax by a fax machine.

- *Lopez v. Charles Schwab & Co., Inc.*, 118 Cal. App. 4th 1224 (1st Dist. 2004) – Because a brokerage agreement provided that it was effective only after approval of an account application, arbitration in that agreement was unenforceable when account application was not approved.

- *Jara v. Suprema Meats*, 121 Cal. App. 4th 1238 (1st Dist. 2004) – A promise that shareholders of a corporation had the right to approve salary increases for corporate employees requires consideration that flows from a bargain. An unsolicited promise not conditioned on mutual promise was not supported by consideration.

- *Prouty v. Gores Tech. Group*, 121 Cal. App. 4th 1225 (3d Dist. 2004) – A buyer of a business agreed with the seller that (i) the buyer would not terminate any of seller's employees for a fixed period, and (ii) if any were terminated during the fixed period, the employees would receive certain benefits. The buyer did not abide by these agreements and the employees sued. The court held that because the parties "intended" to benefit the employees, the employees were third-party beneficiaries of the agreement. The court held that provisions in the contract denying anyone third-party-beneficiary status did not apply.

- *Schlessinger v. Holland Am., N.V.*, 120 Cal. App. 4th 552 (2d Dist. 2004) – Forum-selection clause in cruise contract was enforceable when passenger had opportunity to read contract before trip, regardless of whether she actually read it.

- *Wolf v. Superior Court*, 114 Cal. App. 4th 1343 (2d Dist. 2004) – A contract provided for a 5-percent royalty on "gross receipts" related to character merchandise. The court held that the term "gross receipts" was reasona-

bly susceptible of an interpretation that included valuable in-kind consideration as well as cash. Thus the trial court should have received relevant proffered extrinsic evidence of industry custom and usage as an aid to interpreting the contract term.

B. Releases, Exculpation and Indemnity Clauses

- *Burnett v. Chimney Sweep*, 123 Cal. App. 4th 1057 (2d Dist. 2004) – An exculpatory clause in a commercial lease in favor of the lessor did not affect the public interest and was not unenforceable for that reason. However the failure of the clause to refer to "active" negligence prevented the lessor from applying the clause in that circumstance.

C. Adhesion Contracts, Unconscionable Agreements, Good Faith and Other Public Policy Limits, Interference with Contract

- *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089 (2d Dist. 2004) – A party to a contract agreed to consider proposals by the other party. The first party did not consider the proposals made by the other party and the refusal violated the implied covenant of good faith and fair dealing. Although the first party had no obligation to approve the proposals, good faith required that the good faith consideration of the proposals.

- *Eggett v. Wasatch Energy Corp.*, 2004 UT 28 – Implied duty of good faith limits rights of a party that has discretion under a contract when determining the value of an asset.

D. Jurisdiction, Choice of Law and Choice of Forum

- *Business Loan Ctr., Inc. v. Nischal*, 331 F. Supp. 2d 301 (D.N.J. 2004) – A loan agreement's lack of choice-of-law provision resulted in the application of the law where the collateral was located, despite fact all parties were located in another state.

- *LaSalle Bus. Credit, L.L.C. v. GCR Eurodraw S.p.A.*, No. 03C6051, 2004 WL 1880004 (N.D. Ill. Aug. 18, 2004) – An issuing bank under a letter of credit, who was the applicant's assignee, could not sue the beneficiary in Illinois because beneficiary did not have contacts with Illinois, and the harm to the applicant was done in Ohio.

- *Hughes Elecs. Corp. v. Citibank Delaware*, 120 Cal. App. 4th 251 (2d Dist. 2004) – A deposit account agreement between a bank and its customer provided for the application of the "laws" of New York. The reference to "laws" included the New York statute of limitations and the claim was barred. Further the court held that there was no California fundamental public policy that would prevent the application of New York law.

- *Citicorp Leasing, Inc. v. United Am. Funding, Inc.*, No. 03 Civ. 1586 (WHP), 2004 U.S. Dist. LEXIS 739 (S.D.N.Y. Jan. 21, 2004) – The court denied guarantor's motion to transfer lender's suit against the guarantors despite the fact that the forum selection clause in the guaranty was not mandatory. The loan agreement had a forum selection clause for the state and federal courts of New York, the issues concerning liability under the loan agreement were identical to those under the guaranty, and judicial economy strongly favored retaining the suit on the guaranties in New York.

- *JP Morgan Chase Bank v. Altos Hornos De Mex., S.A. de C.V.*, No. 03 Civ. 1900 (HB), 2004 U.S. Dist. LEXIS 166 (S.D.N.Y. Jan. 7, 2004) – The court refused to interfere in a Mexican bankruptcy proceeding involving a Mexican debtor, a US bank, a US collection account, and documents governed by US law on grounds of international comity. As a result, funds in the US account were subject to the jurisdiction of the Mexican bankruptcy court.

E. Arbitration

- *In re Kaiser Group Int'l, Inc.*, 307 B.R. 449 (D. Del. 2004) – A parent company who guaranteed its foreign subsidiary's performance under a contract containing an arbitration clause was required to arbitrate. The guaranty did not contain an arbitration agreement and the parent was not a party to the underlying contract. The parent was equitably estopped to avoid arbitration because the parent benefited directly from the contract.

- *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 121 Cal. App. 4th 1156 (3d Dist. 2004) – A party to agreement could not waive a statutory right to seek to disqualify an arbitrator by the party's agreement to use arbitra-

tion rules that gave the arbitration association exclusive right to address challenges to an arbitrator.

- *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547 (2d Dist. 2004) – The parties to an arbitration agreement can agree that the arbitrator has the power to determine if a dispute is subject to the arbitration agreement. An arbitration agreement that incorporated the AAA rules constituted such an agreement because the AAA rules provide for the arbitrator to make that decision.

- *Crippen v. Central Valley RV Outlet, Inc*., 124 Cal. App. 4th 1159 (5th Dist. 2004) – An agreement to arbitrate was not procedurally unconscionable. The buyer of a used motor vehicle challenged the arbitration agreement in his purchase agreement. He was unable to show oppression (arising from inequality of bargaining power) or surprise (a "buried" term).

- *Greenbriar Homes Cmty., Inc. v. Superior Court*, 117 Cal. App. 4th 337 (3d Dist. 2004) – A judicial reference clause was not unconscionable where it was located near the signature block and was not substantively unfair.

F. Tort v. Contract Law

- *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am.*, 115 Cal. App. 4th 168 (3d Dist. 2004) – A party to a contract that breaches the contract may be liable to the other party for breach of contract, but not for the tort of interference with contract.

- *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979 (2004) – The economic loss rule does not apply to an independent common law tort claim of intentional misrepresentation or fraud in the performance of a contract. Thus a party to a contract could bring a tort claim based on the other party's presentation of false certificates of performance. The general contractual policy of allowing parties to negotiate the allocation of risks does not apply to the risk of fraud.

G. Damages

- *Navarro v. Perron*, 122 Cal. App. 4th 797 (2d Dist. 2004) – Where one partner in a partnership breaches the partnership agreement, the other partner is entitled to seek damages *or* the dissolution of the partnership.

- *Lewis Jorge Const. Mgmt., Inc. v. Pomona Unified School Dist.*, 34 Cal. 4th 960 (2004) – A surety company that terminated a construction company's bonding availability was not liable for the construction company's lost profits on potential jobs lost due to the lack of bonding capacity. Applying *Hadley v. Baxendale*, the court held that the damages were not reasonably foreseeable.

- *Toscano v. Greene Music*, 124 Cal. App. 4th 685 (4th Dist. 2004) – An employee that quit his existing job to take a new one could bring an action based on promissory estoppel when the new employer withdrew its employment offer after the employee had resigned from his existing job. The employee was entitled to recover his lost wages so long as they were not speculative or remote.

- *Agosta v. Astor*, 120 Cal. App. 4th 596 (4th Dist. 2004) – An employer that lures an employee from the employee's existing job to a new one by promise of compensation that the new employer never intended to keep cannot avoid liability because the employee was an "at will" employee.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. *Bankruptcy Code*

1. *Automatic Stay*

- *In re Holyoke Nursing Home, Inc.*, 372 F.3d 1 (1st Cir. 2004) – The Health Care Financing Administration may deduct portions of overpayments from past reimbursements as "recoupment," and not as setoff. Therefore the deductions were not a preference or a violation of the automatic stay.

- *In re Bankvest Capital Corp.*, 375 F.3d 51 (1st Cir. 2004) – Secured party received and kept a payment from the debtor during the automatic stay period. The trustee sought to have the payment avoided and secured party sanctioned. The court held that it would be futile to avoid the payment because the secured party would have a perfected first-priority status in the payment if it was avoided.

- *Meyer Med. Physicians Group, Ltd. v. Health Care Serv. Corp.,* 385 F.3d 1039 (7th Cir. 2004) –The court held that, regardless of the character of the debt and regardless of whether the offsetting obligations arose from different transactions, setoff was appropriate under Bankruptcy Code § 553(a) because the offsetting obligations arose under the same right and between the same parties standing in the same capacity as obligor and obligee.

2. *Substantive Consolidation*

- *In re Owens Corning*, 316 B.R. 168 (Bankr. D. Del. 2004) – Court ordered the substantive consolidation of Owens Corning of Delaware and 17 of its wholly-owned subsidiaries. The companies were party to a fairly typical credit facility in which the lender group made loans to the corporate parent that were guaranteed by each of its "major" subsidiaries. In the bankruptcy proceeding, the bank lenders took the position that each of the subsidiaries should be viewed as a separate and distinct debtor. The court refused, concluding that the creditors had not relied on the separate existence of the subsidiaries because they

had not received or evaluated separate financial statements for each subsidiary and had made a commitment to the entire enterprise. The court also stated that it had "no difficulty" concluding that there was substantial identity between the parent and subsidiaries because they (1) were controlled by product-line, not subsidiary, (2) had no individual business plans or budgets, (3) did not have independent senior management, (4) were created "primarily for tax reasons" and convenience, (5) were dependent on the parent for funding and (6) did not control their own finances. The court further noted that the mere existence of the guarantees further justified consolidation.

Comment: Because this loan structure is frequently used, lenders must be mindful of this court's decision in structuring loans. Although the case did not directly involve a securitization structure or a bankruptcy remote SPV, parties entering into securitization structures should be mindful as well - because any application of the rare remedy of substantive consolidation is noteworthy. **[expand]**

- *In re Central European Indus. Dev. Co., LLC,* 288 B.R. 572 (Bankr. N.D. Cal. 2003) – The court determined substantive consolidation of an SPE was not justified. Consolidation had been sought as a method to change the voting rights with respect to a proposed bankruptcy plan.

  Comment: The case contains interesting discussions and dicta regarding the doctrine of substantive consolidation and its applicability to SPEs.

- *Lifewise Master Funding v. Telebank*, 374 F.3d 917 (10th Cir. 2004) – Under former Article 9, a lender with an all-asset lien on borrower's assets did not have a lien on collateral sold to SPV, which was a wholly-owned subsidiary of borrower, where the borrower was allowed to sell contracts in the ordinary course of business to third-party purchasers without recourse to the borrower. The borrower was obligated to buy back certain contracts from the SPV, if such contracts did not satisfy certain representations and warranties.

- *In re Dehon, Inc.*, Nos. 02-41045, 04-04286, 2004 Bankr. LEXIS 1470 (Bankr. D. Mass. Sept. 24, 2004) – The bankruptcy court found that, if the facts alleged were true, the plan administrator could be able to make out a sufficient case for the substantive consolidation of the

debtor and the affiliates. The court focused on the fact the affiliates appeared to have been financially inseparable from the debtor and under its complete control. *Id*. At *13. If substantive consolidation is established at trial, the plan administrator could file a complaint regarding a property sale that would have otherwise been untimely.

- *In re Calhoun*, 312 B.R. 380 (Bankr. N.D. Iowa 2004) – When a member of an LLC files for bankruptcy, but the LLC has not filed for bankruptcy, the automatic stay does not apply to actions against the LLC.

  Comment: This case could be helpful precedent in structuring bankruptcy-remote SPV's in securitization transactions - first, because it evaluates the application of the Bankruptcy Code to LLC's and second, because it concludes that an LLC and its member should be treated separately in bankruptcy.

- *In re Century Elecs. Mfg., Inc.*, 310 B.R. 485 (Bankr. D. Mass. 2004) – Court analyzed whether or not substantive consolidation should be given retroactive effect. The analysis focused on whether when Debtor A and Debtor B are consolidated, a creditor who received a preferential payment from Debtor A could rely on the fact that it gave new value to Debtor B.

3. *Claims*

   - *Carrieri v. Jobs.com, Inc*., 393 F.3d 508 (5th Cir. 2004) – Holders of stock with a redemption provision and warrants to buy stock own "equity securities" and not "claims" that can be made in the issuer's bankruptcy proceeding. Bankruptcy Code § 101(16)(C).

4. *Bankruptcy Estate*

   - *In re NTA, LLC*, 380 F.3d 523 (1st Cir. 2004) – Membership interests placed in escrow prior to the filing of bankruptcy were not part of the bankruptcy estate where, pursuant to the terms of the escrow agreement, the creditor was entitled to delivery of the interests upon the occurrence of certain events and a two-day waiting period. Those events had occurred and only a few hours of the waiting period remained when the debtor filed for bankruptcy.

- *In re First Cent. Fin. Corp.*, 377 F.3d 209 (2d Cir. 2004) – A tax refund received by a parent debtor on behalf of its nondebtor subsidiary was part of the parent debtor's bankruptcy estate even though there was a written agreement that the parent turn the funds over to the subsidiary. The court refused to impose a constructive trust in favor of the subsidiary and instead ruled that the subsidiary was an unsecured creditor of the parent.

  Comment: This case is a reminder of the risk involved any time cash passes through an affiliate of your debtor or SPV whether pursuant to a tax sharing arrangement, the servicing of collections, or otherwise.

- *In re Midpoint Dev., L.L.C.*, 313 B.R. 486 (Bankr. W.D. Okla. 2004) – A dissolved Oklahoma LLC can be a Chapter 11 debtor under the Bankruptcy Code.

  Comment: This case provides interesting analysis of the treatment of LLC's in bankruptcy.

- *In re Kmart Corp.*, 359 F. 3d 866 (7th Cir.), *cert. denied*, 125 S. Ct. 495 (2004) – The bankruptcy court allowed a debtor to pay the pre-petition debt owed to certain unsecured creditors that debtor identified as "critical." All other unsecured creditors received $.10 on the dollar, mostly in the form of stock. In a sharply worded opinion, the court of appeals upheld the district court's reversal of the bankruptcy court and found that the critical vendors had received preferences which the debtor was entitled to recoup for the benefit of all the creditors. Without deciding whether a critical vendors concept is supported by Bankruptcy Code § 363(b)(1), the court held that, if such a concept did exist, the bankruptcy court would have had to find that (1) but for payment of the critical-vendor's pre-petition debt the vendors would not continue to supply the debtor and (2) the unpaid unsecured creditors would be as well off with reorganization as with liquidation. The opinion noted that the first prong would not be true for vendors who were contractually obligated to continue to supply the debtor and that the bankruptcy judge should have considered whether a letter of credit supporting payment for future deliveries would have been sufficient to induce critical vendors to continue making deliveries.

- *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004) – All federal courts, including bankruptcy courts, are bound by the probate exception to federal court jurisdiction.

- *In re Sunterra Corp.*, 361 F.3d 257 (4th Cir. 2004) – Bankruptcy Code § 365 prevents (i) the assignment by debtor of a non-exclusive intellectual property license and (ii) the assumption of the license by the debtor, unless the licensor consents or other non-bankruptcy law allows it.

5. *Plans*

   - *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) – Court adopts "formula rate" for purposes of cram down.

   - *Pacific Decision Scis. Corp. v. Superior Court,* 121 Cal. App. 4th 1100 (4th Dist. 2004) – California court did not have jurisdiction to garnish bank account "located" outside of California.

6. *Secured Parties*

   - *In re Proalert, LLC*, 314 B.R. 436 (B.A.P. 9th Cir. 2004) – Debtor may use cash proceeds of undersecured secured party's collateral under Bankruptcy Code § 363 if secured party has "adequate protection." Debtor does not have to demonstrate satisfaction of surcharge rules of Bankruptcy Code § 506(c).

7. *Avoidance Actions*

   - *In re JWJ Contracting Co., Inc.*, 371 F.3d 1079 (9th Cir. 2004) – A creditor's acceptance of check which was subsequently dishonored in exchange for new value given to the debtor transformed what would have been a contemporaneous exchange into a credit transaction. Thus a later payment to make good the bounced check was an avoidable preference.

8. *Executory Contract*

   - *In re BankVest Capital Corp.*, 360 F.3d 291 (1st Cir.), *cert. denied*, 124 S. Ct. 2874 (2004) – Bankruptcy Code § 365(b)(2)(D) permits the debtor-

in-possession to assume an unexpired lease without first curing the non-monetary defaults.

- *In re Trak Auto. Corp.*, 367 F.3d 237 (4th Cir. 2004) – Debtor sought to assign lease that contained an explicit-use restriction to the sale of auto parts to a clothing store. The debtor argued that the restriction was an unenforceable anti-assignment provision under Bankruptcy Code § 365(f)(1). The court held that Bankruptcy Code § 365(b)(3)(C), which specifically requires a debtor-tenant at a shopping center to assign its store lease subject to use restrictions, controls as the more specific provision.

B. Consumer

- *Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316 (8th Cir. 2004) – The Federal Fair Debt Collection Practices Act, 15 USCA 1692 *et seq*. prohibits a debt collector from indicating on an outside envelope that the communication involves the collection of a debt. The debt collector's name was "Diversified Collection Services," but the envelope showed only its initials "D.C.S." The use of the initials did not violate the Act.

C. Professionals

- *In re Reynoso,* 315 B.R. 544 (B.A.P. 9th Cir. 2004) – Bankruptcy petition preparers using a web site to provide forms were "practicing law." Bankruptcy Code § 110(a).

- *Vega v. Jones, Day, Reavis & Pogue*, 121 Cal. App. 4th 282 (2d Dist. 2004) – Law firm for buyer of company in M & A transaction could be liable to seller for failing to disclose in a schedule to the acquisition documents effect of "toxic" terms of third-party financing transaction because of effect of those provisions on stock used by buyer as part of purchase price. The claim is based on allegations that law firm "actively conceal[ed]" the information after undertaking to disclose information about the financing transaction.

- *Dean Foods Co. v. Pappathanasi*, 18 Mass. L. Rptr. 598 (Mass. Super. Ct. 2004) – A law firm gave a "no litigation" confirmation. The law firm was liable to the opinion recipient where a person involved in the preparation of the confirmation mistakenly concluded that a criminal investigation

had been concluded and thus made no disclosure of it in the confirmation.

- *Barnes v. Turner*, 606 S.E.2d 849 (Ga. 2004) – A lawyer represented a "mom and pop" seller of a business that took back a more-than-five-year note secured by personal property collateral. The lawyer properly filed a financing statement. The lawyer did not advise the client that the financing statement would lapse in five years, unless continued. The financing statement ultimately lapsed and a junior secured party became senior. The buyer of course ended up in Chapter 11 and the seller ended up with insufficient dollars. The seller sued its lawyers for malpractice and the court held that the lawyers had a duty either to (i) continue the financing statement, or (ii) advise the client of the need to continue the financing statement. The court based its holding on its conclusion that "only" the lawyers knew about the five-year rule and that the client could not be expected to know about it.

  Comment: Presumably this analysis would not apply to a secured party in the business of making loans secured by personal property who would know about the five-year life of a financing statement. The case underscores the benefit of explaining and memorializing the need to continue security interest filings, particularly where the secured party if not generally the business of lending.

- *National Bank of Canada v. Hale & Dorr, LLP*, 17 Mass. L. Rptr. 681 (Mass. Super. Ct. 2004) – The court held that law firm may be liable for a misrepresentation resulting from a legal opinion the firm issued to lenders in a financing transaction. The opinion stated that "to our knowledge" there was no litigation against the debtor. The court concluded that the phrase "our knowledge" suggested that the attorneys had superior knowledge about the borrower's litigation and thus could be liable for misrepresentation under Massachusetts law, where a statement of opinion can be the ground for a claim if the speaker has superior knowledge of the subject matter. The court also concluded that, because the law firm was borrower's counsel, the firm could not be liable to the lender, a non-client, for negligence.

- *Washington Group Int'l, Inc. v. Bell, Boyd & Lloyd LLC*, 383 F.3d 633 (7th Cir. 2004) – A former client sued the firm for malpractice for filing a mechanic's lien with an incorrect legal description and for not advising the

client that work had to be completed within three years for the lien to be valid. The court held that the client's success in bankruptcy court precluded it from asserting that the legal description was incorrect and that the client had not shown that the firm's failure to advise had resulted in damages. The firm was hired late in the second year of construction and there was no evidence that the work could have been completed earlier had the client been aware of the three-year limit.

- *Holley v. Crank*, 386 F.3d 1248 (9th Cir. 2004) – Designated individual real estate broker of California real estate broker entity is personally responsible for supervision of salespersons and was vicariously liable when salesperson discriminated against a customer.

TABLE OF AUTHORITIES

Page

CASES

STATUTES